SRI DEVI KANAN & ORS v. MALAYSIAN AIRLINE SYSTEM BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN JC
[CIVIL SUIT NO: WA-21NCVC-15-02-2016]
26 SEPTEMBER 2016

CIVIL PROCEDURE: *Striking out – Statement of claim – Particulars – Tort claim – Claim for negligence and breach of duty – Claim by dependents of passenger of missing flight – Failure to identify particulars of negligence and breach of statutory duty – Whether detrimental to claim – Whether statement of claim disclosed reasonable cause of action – Whether reliefs sought by claimant appropriate – Whether action bona fide and genuine – Whether claim ought to be struck out*

CIVIL PROCEDURE: *Discovery – Confidential documents – Application for – General and specific discovery of documents related to incident – Whether privilege applies – Requirements under Government Proceedings Act 1956, ss. 5 & 6*

TORT: *Negligence – Beach of duty – Claim by dependents of passenger of missing flight – Failure to identify particulars of negligence and breach of statutory duty – Whether detrimental to claim – Whether statement of claim disclosed reasonable cause of action – Whether doctrine of res ipsa loquitur applicable*

The plaintiffs, the dependents of a passenger of Flight MH370 ('Puspanathan'), claimed against, *inter alia*: (i) the Department of Civil Aviation ('the fourth defendant') and its Director General ('the third defendant') for negligence and breach of statutory duty; (ii) the Immigration Department of Malaysia ('the sixth defendant') and its Director General ('the fifth defendant') for breaches of duty which led to the boarding of two passengers ('the two passengers') whose travel documents were purportedly falsified and/or stolen, compromising the safety of the aircraft and its passengers and crew; (iii) the Royal Malaysian Air Force ('the eighth defendant') and its Chief ('the seventh defendant') for their failure to take adequate steps after their military radar detected the turning back of Flight MH370 from its original course; and (iv) the Government of Malaysia ('the ninth defendant') ('the action'). The plaintiffs submitted that the doctrine of *res ipsa loquitur* applied against the third to eighth defendants ('the defendants'). The defendants applied to strike out the plaintiffs' action on the grounds that (i) the plaintiffs' statement of claim did not plead any cause of action against the defendants; (ii) the doctrine of *res ipsa loquitur* did not apply to the defendants; (iii) the reliefs sought by the plaintiffs were exaggerated; and (iv) the entire action lacked *bona fide*, was frivolous, vexatious and not genuine and an abuse of the court's process ('encl. 14'). The plaintiffs also

made an application against the defendants for both general and specific discovery of documents that were necessary to identify the particular persons whom the plaintiffs regarded as the tortfeasors in their action ('encl. 16').

Held (allowing encl. 14 in part; allowing encl. 16):

(1) Enclosure 14 was allowed in part. The application to strike out the action against the fourth, sixth, seventh and eighth defendants was allowed. The fourth and sixth defendants were Government departments with no separate legal personality. The action would be properly maintained against the third, fifth and ninth defendants. (paras 2, 22 & 49)

(2) In the particulars of the third defendant's negligence and breach of statutory duty pleaded in the statement of claim, the plaintiffs did not identify which particulars related to negligence and which related to breach of statutory duty. These are two distinct causes of action. However, this failure did not warrant a striking out of the action against the third defendant. Whether or not a particular act or omission amounts to a breach of duty – whether that duty exists at common law or a statutory one – is a question of law. It is trite that issues of law need not be pleaded. It suffices for the factual particulars of breach to be pleaded in order to give adequate notice to the defendants of the nature of the plaintiffs' claim to enable the defendants to answer those claims. This had been done and there was no reason to allow the striking out on this ground. (paras 23, 24 & 49)

(3) The cause of Flight MH370's disappearance remained unknown. It would not be possible to exclude the possibility that either one of the two passengers or both somehow contributed in some way to its disappearance. So long as there remains some possibility of their involvement, no matter how remote that possibility may seem, the action against the fifth defendant ought not to be struck out. An action may not be struck out merely because a plaintiff's case is weak as long as the statement of claim discloses a cause of action. The application to strike out the action against the fifth defendant was dismissed (paras 32 & 49)

(4) The striking out of the action against the seventh and eighth defendants was allowed as the statement of claim did not disclose any reasonable cause of action against either of them. The primary duty of the seventh defendant is to guard the safety of Malaysian airspace from external threats to the sovereignty of the nation. The air force does not owe any duty of care to private citizens to be accountable for adequate and satisfactory answers to the family members such as the plaintiffs. (paras 34, 35, 37 & 49)

(5) *Res ipsa loquitur* is a rule of evidence and not a principle of law. Rules of evidence can only be properly applied to the evidence to be adduced at trial. It would be premature to strike out the action on this ground. (para 40)

(6) The quantum of damages would be subject to proof at trial. Even if the plaintiffs' claim was overly optimistic, it did not justify the striking out of the whole action. (para 42)

(7) The plaintiffs have lost a father, a son and a husband. The very suggestion that the action was not *bona fide* or was not genuine was inimical to good conscience. Furthermore, there were sufficient pleaded facts to establish that the plaintiffs' case against the third, fifth and ninth defendants was not groundless or bereft of any prospect success. The inclusion of the third, fifth and ninth defendants as parties to the action could not be said to be frivolous, vexatious or an abuse of the court's process. (paras 44-45)

(8) Enclosure 16 was allowed. There were documents in the possession, custody or power of the defendants which related to the incident in question. These documents were or might be relevant to the facts pleaded in the statement of claim. Whether or not privilege applies will be a matter for determination by the court. The documents were required in order for the plaintiffs to fulfil the requirements of ss. 5 and 6 of the Government Proceedings Act 1956. Furthermore, tortfeasors must be made a defendant in an action before proceedings may be maintained against the Government for vicarious liability. (paras 3, 56, 58 & 60)

Case(s) referred to:

Aleyasak Hamid v. Ketua Polis Kuala Lumpur & Yang Lain [2015] 5 CLJ 71 HC ***(refd)***

Bank Kerjasama Rakyat Malaysia Bhd v. Lee Kam Yoong & Anor; Aseambankers (M) Bhd & Ors (Third Parties) [2012] 8 CLJ 823 HC ***(refd)***

Boo Are Ngor v. Chua Mee Liang [2009] 6 CLJ 617 FC ***(refd)***

Hu Sepang v. Inspector Keong On Eng & Ors [1991] 2 CLJ 999; [1991] 2 CLJ (Rep) 739 HC ***(refd)***

Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(dist)***

Lok Kok Beng & Ors v. Loh Chiak Eong & Anor [2015] 7 CLJ 1008 FC ***(refd)***

Manilal & Sons (Pte) Ltd v. Bhupendra KJ Shan (T/A JB International) [1981] 1 LNS 204 HC ***(refd)***

Matang Plastik & Metal Work Industries Sdn Bhd & Ors v. Daimler Chrysler Malaysia Sdn Bhd & Ors [2014] 8 CLJ 998 CA ***(refd)***

Middy Industries Sdn Bhd & Ors v. Arensi-Marley (M) Sdn Bhd [2012] 1 LNS 830 CA ***(refd)***

Yekambaran Marimuthu v. Malayawata Steel Berhad [1994] 2 CLJ 581 HC ***(refd)***

Legislation referred to:
Civil Aviation Act 1969, s. 2B
Government Proceedings Act 1956, ss. 5, 6
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d), (2)

For the plaintiffs - Brijnandan Singh Bhar & Shailender Bhar; M/s Brijnandan Singh Bhar & Co
For the 3rd-9th defendants - Alice Loke; SFC

Reported by Najib Tamby

JUDGMENT

Azizul Azmi Adnan JC:

Introduction

[1] This suit emanates from the disappearance of a Boeing 777 bearing the registration number 9M-MRO and flight code MH370 on 8 March 2014.

[2] The third to ninth defendants applied to strike out the suit in encl. 14, which this court allowed in part. There is now a cross-appeal against this decision.

[3] The plaintiffs applied for discovery in encl. 16, which I also allowed. The third, fifth and ninth defendants have appealed against this decision.

[4] These grounds record the reasons for the decision of the court in each application. They are dealt with in turn.

Striking Out

The Parties

[5] The plaintiffs are the dependents of Puspanathan Subramaniam, a passenger on MH370.

[6] The first defendant was the former operating entity of the national carrier, whose business has since been transferred to the second defendant pursuant to the Malaysian Airline System Berhad (Administration) Act 2015. However, neither of them was involved in the striking out application in encl. 14.

[7] The third defendant, Dato' Sri Azharuddin Abdul Rahman, is the Director General of Civil Aviation, which is a position provided for in the Civil Aviation Act 1969. Dato' Sri Azharuddin heads the fourth defendant, Jabatan Penerbangan Awam (commonly referred to by its English name, the Department of Civil Aviation or DCA), which is the government department charged with the responsibility for civil aviation in Malaysia.

[8] The fifth defendant, Dato' Aloyah binti Mamat, is the Director General of Jabatan Imigresen Malaysia, the sixth defendant. Like the fourth defendant, the sixth defendant is a government department.

[9] Tentera Udara DiRaja Malaysia (TUDM), the eighth defendant, was headed at the material time by the seventh defendant, General Tan Sri Dato' Sri Rodzali bin Daud.

[10] The striking out application affected only the third to ninth defendants, that is to say, the defendants that were related to the Government of Malaysia. The Government of Malaysia is the ninth defendant.

[11] In this judgment, unless the context otherwise requires, references to "the defendants" shall be taken to mean the third to ninth defendants.

The Plaintiffs' Preliminary Objections

[12] The plaintiffs raised three preliminary objections.

[13] Firstly, learned counsel for the plaintiffs contended that the defendants' application for striking out ought to be dismissed on the basis that it was made after pleadings had closed and after the suit had been set down for trial. The case of *Boo Are Ngor v. Chua Mee Liang*[1] was cited, where the Federal Court held:

> It is our view that O. 18 r. 19(1) of the RHC 1980 does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial (see the case of *Bank Bumiputra Malaysia Berhad & Anor v. Lorrain Esme Osman & Ors* [1987] 2 MLJ 633; [1987] CLJ (Rep) 472).

[14] Based on the court's records maintained in its case management system, the trial dates were fixed in a case management conference before Abu Bakar Jais J on 20 May 2016. The defendants' striking out application was filed on 19 May 2016, before the case was set down for trial. This meant that the application ought not be refused purely on this ground.

[15] Secondly, it was argued that the ground for striking out under O. 18 r. 19(1)(a) of the Rules of Court 2012 had been abandoned by the defendants due to the fact that p. 4 of the notice of application did not make any specific reference to O. 18 r. 19(1)(a).

[16] Page 4 of the application contains the closing paragraphs of the application, which reads as follows:

> Alasan permohonan ini di bawah Aturan 18 Kaedah 19(1)(b) atau (d) Kaedah-Kaedah Mahkamah 2012 akan dinyatakan dengan lebih terperinci dalam Afidavit Sokongan yang diikrarkan oleh Shaiful Nizam bin Shahrin yang difailkan bersama-sama permohonan ini.

[17] In my judgment, it was sufficient for the grounds of application under O. 18 r. 19(1)(a) to be explained at paras. (a), (b) and (d) at p. 3 of the notice of application, even though no reference was made to the relevant sub-rule.

The words at p. 4 of the notice of application merely stated that additional support for the grounds contained in sub-rr. (1)(b) and (1)(d) will be deposed in the affidavit in support. This sentence necessarily omitted any reference to sub-r. (1)(a) because O. 18 r. 19(2) prohibits the court from having regard to any evidence for the purposes of making a determination on an application under sub-r. (1)(a). Such a determination can only be made on the basis of the pleadings alone.

[18] Thirdly, counsel for the plaintiffs pointed out that the affidavit in support of the striking out application had been affirmed by a federal counsel acting for the defendants. It is trite law a solicitor should not depose an affidavit on behalf of a litigant if the facts to be deposed are contentious or disputed questions of fact (see *Bank Kerjasama Rakyat Malaysia Bhd v. Lee Kam Yoong & Anor; Aseambankers (M) Bhd & Ors (Third Parties)*[2].

[19] Having reviewed the affidavit in support deposed by federal counsel at encl. 15, I was of the view that the affidavit did not contain any disputed or contentious facts. In fact, the affidavit did not contain any facts at all, but raised points of law, which in my view ought to have been better addressed by way of submissions. However, this infirmity in the affidavit in support did not justify my refusing to hear the application, and on this basis I proceeded to hear the application on its merits.

The Grounds For Striking Out

[20] The grounds upon which striking out were sought were as follows:

(a) that the statement of claim did not plead any cause of action against the DCA or its director general;

(b) that the statement of claim did not plead any cause of action against Jabatan Imigresen or its director general;

(c) that the statement of claim did not plead any cause of action against TUDM or Gen Tan Sri Rodzali Daud;

(d) that the doctrine of *res ipsa loquitur* does not apply in relation to the third to eighth defendants, as pleaded by the plaintiffs in the statement of claim;

(e) that the reliefs claimed by the plaintiffs were exaggerated;

(f) that the entire suit was frivolous and vexatious and an abuse of the court's process.

[21] These grounds are addressed in the following paragraphs, though not necessarily in the order that they have been set out above.

The Action Against The DCA And Jabatan Imigresen (D4 And D6, Respectively)

[22] Both the DCA and Jabatan Imigresen are government departments, and have no separate legal personality. For this reason alone the striking out against the fourth and sixth defendants was allowed. The action would be properly maintained against the ninth defendant, the Government of Malaysia.

The Action Against The Director General Of Civil Aviation (D3)

[23] Learned Senior Federal Counsel pointed out that the plaintiffs have not, in the particulars of negligence and breach of statutory duty that have been pleaded in the statement of claim, identified which particulars relate to negligence and which relate to breach of statutory duty. These are two distinct causes of action, and hence, as I understand counsel's argument, the particulars of breach must be related back to one or other cause of action.

[24] In my judgment, the fact that the particulars of breach have not been identified as relating to one or other or to both causes of action does not warrant a striking out of the action against the third defendant. Whether or not a particular act or omission amounts to a breach of duty – whether that duty be one that exists at common law, or a statutory one – is a question of law, and it is trite that issues of law need not be pleaded. It suffices for the factual particulars of breach to be pleaded, so as to give adequate notice to the defendants of the nature of the plaintiffs' claim to enable the defendants to answer those claims. This had been done, and I saw no reason to allow the striking out on this ground.

[25] Learned Senior Federal Counsel also pointed out that the office of Director General of Civil Aviation is statutorily provided for in the Civil Aviation Act 1969, and that this Act specifically provides for the duties and functions of the Director General. Counsel argued that none of the particulars of breach that have been pleaded related to the duties and functions provided for under s. 2B of the Civil Aviation Act 1969, and that s. 2B "does not provide for ensuring the safety of passengers on commercial flights".

[26] For ease of reference, s. 2B provides as follows:

Section 2B. Duties and functions of the Director General.

It shall be the duty and function of the Director General:

(a) to exercise regulatory functions in respect of civil aviation and airport and aviation services including the establishment of standards and their enforcement;

(b) to represent the Government in respect of civil aviation matters and to do all things necessary for this purpose;

(c) to ensure the safe and orderly growth of civil aviation throughout Malaysia;

(d) to encourage the development of airways, airport and air navigation facilities for civil aviation;

(e) to promote the provision of efficient airport and aviation services by the licensed company; and

(f) to promote the interests of users of airport and aviation services in Malaysia in respect of the prices charged for, and the quality and variety of, services provided by the licensed company.

[27] In the course of submissions, I had asked learned Senior Federal Counsel whose responsibility it is to regulate and manage the safe passage of aircraft over Malaysian airspace (ie, air traffic control functions). Counsel conceded that this was a duty of the DCA. Yet this duty was not specifically set out in s. 2B. It follows therefore that s. 2B is not meant to be an exhaustive listing of the duties and obligations of the Director General of Civil Aviation. Accordingly, the mere fact that the pleaded particulars of breach cannot be related to a duty or function set out in s. 2B does not mean that the action against the Director General of Civil Aviation ought to be struck out.

[28] It was also advanced that the death of Mr Puspanathan, the first plaintiff's husband, was unexpected, unprecedented and unforeseeable, and that absent foreseeability, there cannot be said to exist a duty of care on the part of the third defendant. Learned Senior Federal Counsel cited the recent Federal Court case of *Lok Kok Beng & Ors v. Loh Chiak Eong & Anor*[3], where it was held that:

(i) The threshold test in determining the existence of duty of care is that of foreseeability. The rule in the case of *Heaven v. Pender* as quoted above envisaged that a man ought to have foreseen certain consequences if he created a real risk of them. The test is whether damage to someone in the plaintiff's position was a reasonably foreseeable consequence of the defendant's negligence. Reasonable foreseeability does not of itself lead to a duty of care and that the speech of Lord Atkin of persons who are so closely and directly affected by my act stressed not only on the requirement of foreseeability of harm but also that of a close and direct relationship of proximity.

(ii) By foreseeability, liability for a consequence is imposed and judged by the standard of the reasonable man that he ought to have foreseen it. In the words of the Privy Council in *Overseas Tankship (UK) Ltd Appellants; and Morts Dock & Engineering Co Ltd (The Wagon Mound)* - [1961] AC 388, 423:

> For, if it is asked why a man should be responsible for the natural or necessary or probable consequences of his act (or any other similar description of them) the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged by the standard of the reasonable man that he ought to have foreseen them.

(iii) Closer to home, the Singapore Court of Appeal in *Spandeck Engineering (S) Pte Ltd v. Defence Science & Technology Agency* [2007] 4 SLR 100 observed that the requirements of foreseeability is merely a threshold question that needs to be answered in every negligence claim, having regard to the facts of the case without resorting to any legal formulation. By the term factual foreseeability *Spandeck* takes the view that it is from a factual perspective, that the defendant ought to have known that the claimant would suffer damage from his carelessness. Being merely factual, it is not concerned with the kind and extent of losses suffered by the plaintiff and that it must not be confused with the question of remoteness of damages in tort.

[29] In my judgment, death of a passenger in an aircraft would be a foreseeable result of a failure by the DCA to properly and correctly perform its air traffic control functions. Whether or not there was any such failure in this instance is a matter for determination at trial.

The Action Against The Director General Of Jabatan Imigresen (D5)

[30] The plaintiffs claim that there had been breaches of duty by Jabatan Imigresen which had led to the boarding of two passengers, Delavar Seyed Mohammadreza and Pouria Nour Mohammad Mehrda, whose travel documents were purportedly falsified and/or stolen. These breaches, alleged the plaintiffs, compromised the safety of the aircraft and its passengers and crew.

[31] Ms Loke rightly pointed out that the plaintiffs had not pleaded facts to show how the fact that the Jabatan Imigresen had allowed Mohammadreza and Mehrda to board the flight had caused the loss of MH370 and the death of Mr Puspanathan.

[32] Nonetheless, as at the time of writing, the cause of the disappearance of MH370 remains unknown. Accordingly, it will not be possible to exclude the possibly that Mohammadredza or Mehrda or both somehow contributed in some way to the disappearance of the aircraft. So long as there remains some possibility of their involvement, no matter how remote that possibility may seem based on the state of our understanding of events at the present moment, then the action against the fifth defendant ought not be struck out. The case of *Hu Sepang v. Inspector Keong On Eng & Ors*[4] provides the authority for the principle that an action may not be struck out merely because a plaintiff's case is weak, so long as the statement of claim discloses a cause of action:

The law relating to the summary process of striking out an action on the ground that the statement of claim does not show a cause of action is succinctly stated by Lord Pearson in *Drummond-Jackson v. BMA* [1970] 1 WLR 688. I need to reproduce only the more pertinent passages of Lord Pearson's judgment at p 695:

> Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim on disclosing no reasonable cause of action is a summary power which should be exercised *in plain* and *obvious cases*. (emphasis supplied.)

and at p 696:

> In my opinion the traditional and hitherto accepted view - that the power should only be used in plain and obvious cases - is correct according to the evident intention of the rule for several reasons. First, there is in para (1)(a) of the rule the expression 'reasonable cause of action', to which Lindley MR called attention in *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86, pp 90-91. No exact paraphrase can be given, but I think 'reasonable cause of action' means a cause of action with some chance of success, when (as required by para (2) of the rule) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. In *Nagle v. Feilden* [1966] 2 QB 643 Danckwerts LJ said at p 648:
>
> > The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court.
>
> Salmon LJ said, at p. 651: 'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment, seat unless the case is unarguable.'
>
> On the authority of the above case it is clear that so long as the statement of claim or the particulars disclose some cause of action or raise some question fit to be decided by a judge the mere fact that the case is weak and not likely to succeed is no ground for striking it out.

The Action Against Gen. Tan Sri Rodzali Daud (D8) And TUDM (D7)

[33] In the statement of claim, the plaintiffs claimed that, among others, TUDM did not take adequate steps after their military radar detected the turning back of MH370 from its original north-easterly course.

[34] In my judgment, the air force does not owe any duty of care to private citizens, whether to track and report the location of non-military aircraft, to intercept or to search for such aircraft, or, as suggested by the statement of claim, to be accountable for adequate and satisfactory answers to the family members such as the plaintiffs.

[35] The primary duty of TUDM is to guard the safety of Malaysian airspace from external threats to the sovereignty of the nation. The government may, as a matter of practice and custom, utilise the resources for the military for what may essentially be civilian purposes (such as search and rescue, or relief work in the event of a natural disaster), but the military does

not and cannot owe a duty to ordinary private citizens for the discharge of those functions. The existence of such a duty would subvert and compromise the principal aim of a military force.

[36] Of course, this does not mean that the military is immune from suits brought by private citizens. For example, if in the proper performance of its functions an accident is caused by the military resulting in loss or damage to a private citizen, that citizen will be well within his or her rights to claim for compensation for such loss or damage. That was not, however, the case here.

[37] I therefore allowed the striking out of the plaintiffs' action against Gen Tan Sri Rodzali Daud and TUDM on grounds that the statement of claim did not disclose any reasonable cause of action against either of these defendants.

Res Ipsa Loquitur

[38] The plaintiffs had pleaded that the doctrine of *res ipsa loquitur* applies against the third to eighth defendants. Learned Senior Federal Counsel contended that the doctrine cannot apply in the present instance because one of the criteria for the application of the doctrine is that the thing that inflicted the damage must have been under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control: see *Matang Plastik & Metal Work Industries Sdn Bhd & Ors v. Daimler Chrysler Malaysia Sdn Bhd & Ors*[5]. The flight MH370 was not, according to counsel, under the sole management and control of the third to eighth defendants.

[39] The authorities are in agreement with learned Senior Federal Counsel that the doctrine of *res ipsa loquitur* cannot apply where the defendant does not have exclusive control over the property or object that caused the injury. However, in this particular instance, the doctrine was pleaded at para. 42 of the statement of claim against the first defendant as well as the third to eighth defendants. The first defendant was the operator of the airline at the material time. The second defendant was presumably not included because it is a successor entity to the first defendant, acquiring property and liability of the first defendant pursuant to the Malaysian Airline System Berhad (Administration) Act 2015. The ninth defendant, the government of Malaysia, was also not included in para. 42 as its liability arises vicariously. Accordingly, the defendants that have been named in the plaint are all the possible defendants (and indeed, as determined in paras. 24 to 28 ante also included parties whom in my judgment cannot be held liable for the losses suffered). The first, third and fifth defendants collectively would have had sole and exclusive control over MH370. Therefore this ground for striking out the suit cannot be sustained.

[40] Of course, whether or not the doctrine of *res ipsa loquitur* would apply to impute liability upon the defendants would be a matter for determination after the evidence has been evaluated after trial. This was the second reason why the application for striking out on this ground ought to be refused. *Res ipsa loquitur* is a rule of evidence and not a principle of law, and the rules of evidence can only be properly applied to the evidence to be adduced at trial. It would therefore be premature to strike out the action on this ground.

Whether The Plaintiffs' Claims Are Exaggerated

[41] It was advanced for the defendants that the amount of the plaintiffs' claim was exaggerated and inflated in order to sensationalise the suit against the defendants.

[42] In my judgment, the quantum of damages would be subject to proof at trial. Even if the plaintiffs' claim was overly optimistic, it did not justify the striking out of the whole action.

Whether Suit Is Frivolous, Vexatious And An Abuse Of The Court Process

[43] The final ground upon which the defendants sought to strike out the claim by the plaintiffs was that the suit lacked *bona fides* and that the manner in which the suit had been brought put the genuineness of the action in doubt. In addition, it was contended that the suit should only have been brought against the first and second defendants, and that it was unnecessary for the other defendants to have been included.

[44] I am unable to agree with this contention of learned Senior Federal Counsel. The plaintiffs have lost a father, a son and a husband. We should live in hope that we do not find ourselves grieving as the plaintiffs do. Therefore the very suggestion that the suit was not *bona fide* or was not a genuine action was, in my view, inimical to good conscience.

[45] I would not be succumbing to hyperbole by saying that the tragic loss of MH370 was and still remains one of the world's greatest aviation mysteries. If the defendants do not currently know what had happened to the aircraft, then more so the plaintiffs. Seen in this light, the inclusion of the third, fifth and ninth defendants as parties to the suit could not be said to be frivolous, vexatious or an abuse of the court process.

[46] The Court of Appeal decision in *Middy Industries Sdn Bhd & Ors v. Arensi-Marley (M) Sdn Bhd*[6] sums up the meaning of "frivolous and vexatious" and "abuse of the process" within the meaning of sub-rr. (1)(b) and (1)(d) in the following terms:

> [7] Sub-paragraph (1)(b) of r. 19, deals with pleading which is 'scandalous, frivolous or vexatious'; while sub-para (1)(d) of the same rule deals with 'an abuse of the process of the court'. In *Murray v. Epsom Local Board* [1897] 1 Ch 35 it was held by the court that, 'scandalous' generally refers to matters which improperly cause

derogatory light on someone, usually a party to an action, with respect to moral character or uses repulsive language (see also *Boey Oi Leng (t/a Indah Reka Construction & Trading) v. Trans Resources Corporation Sdn Bhd* [2001] MLJU 566; [2001] 4 AMR 4807 and *Indah Desa Saujana Corp Sdn Bhd & Ors v. James Foong Cheng Yuen, Judge, High Court Malaya & Anor* [2008] 2 MLJ 11). The words 'frivolous or vexatious' generally refer to a groundless action or statement with no prospect of success, often raised to embarrass or annoy the other party to the action. In considering whether any proceedings were vexatious or frivolous, one is entitled to and ought to look at the whole history of the matter and it is not to be determined by whether the pleading discloses a cause of action or not (see *Attorney General of Duchy of Lancaster v. London & North Western Railway Co* [1892] 3 Ch 274; and *Re Vernazza* [1959] 2 All ER 200). It was decided in the above cases that 'frivolous or vexatious actions mean cases which are obviously frivolous or vexatious or obviously unsustainable'.

[8] Raja Azlan Shah J (as HRH then was) had made the following observation in the case of *Malayan Banking Berhad v. Gan Kong Yam* [1972] 1 MLJ 32:

> No precise legal definition can be found as yet, as to the meaning of 'no reasonable defence' or 'frivolous or vexatious' or 'tending to delay the fair trial or the action', but as can be observed a pleading will not be struck out under this rule 'unless it is not only demurrable but something worse than demurrable', that is, such that no legitimate amendment can save it from being demurrable: per Chitty J, in *Republic of Peru v. Peruvian Guano Co*.

[9] Sub-paragraph (d) of the rule deals with pleading which is 'an abuse of the process of the court'. In *Castro v. Murray* (1875) 10 Ex 213, the phrase 'abuse of the process of the court' had been described generally to refer to situation where the court's process is used for unlawful object and not for the actual purpose intended to achieve justice. It involves a process which is contrary to good order established by usage. In dealing with this sub-para. (1)(d), the judge is entitled to look at the affidavit evidence, on the same principle applicable to sub-para. (1)(b). Striking out is not appropriate when there is conflicting evidence in the affidavits. The judge can only determine and decide the issue in question by consideration of the undisputed facts.

[10] In short, the words 'frivolous or vexatious' under r. 19(1)(b) refer to cases which are obviously unsustainable or wrong. The words connote purposelessness in relation to the process or a lack of seriousness or truth and a lack of *bona fide*; they also include proceedings where a party is not acting bona fide and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result (see *Goh Koon Suan v. Heng Gek Kiau &*

Ors [1990] 1 SLR 1251; *Afro Asia Shipping Co Ltd v. Haridass Ho & Partners* [2003] 2 SLR 491; and *Riduan bin Yusof v. Khng Thian Huat & Anor* [2005] 2 SLR 188).

[11] The phrase 'abuse of process' under r. 19(1)(d) signifies that the process of the court must be used bona fide and properly and must not be abused. It includes consideration of public policy and interest of justice. The court will prevent any improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all the relevant circumstances of the case. If an action was not brought bona fide for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court (see *Gabriel Peter & Partners (Suing as a Firm) v. Wee Chong Jin& Ors* [1998] 1 SLR 374 and *Lonrho plc v. Fayed* (No 5) [1993] 1 WLR 1489).

[47] The passages above establish that an action that is frivolous or vexatious is one that is groundless and without any prospect of success. The difference between sub-rr. (1)(a) and (1)(b) is that, under sub-r. (1)(b) the court is entitled to consider the entire background of the matter and is not limited to the pleadings. In my judgment, the principle set out in *Hu Sepang v. Keong On Eng & Ors* (discussed at para. 32 *ante*) would also be applicable here, ie, that the mere fact that a plaintiff's case may appear weak should not form the basis for striking out the action. In the present instance, there were sufficient pleaded facts to establish that the plaintiffs' case against the third, fifth and ninth defendants were not groundless or bereft of any prospect of success.

[48] I was also of the view that there is no evidence to support the contention that the plaintiffs' action is not *bona fide*, and hence the defendants' application to strike out the action under O. 18 r. 19(1)(d) was also refused.

Summary

[49] For the reasons set out above:

(a) I allowed the striking out against the DCA and Jabatan Imigresen Malaysia, the fourth and sixth defendants respectively, on the basis that they are government departments and do not have any separate legal personality;

(b) I allowed the defendants' application to strike out the action against the Gen. Tan Sri Rodzali Daud and TUDM, the seventh and eighth defendants respectively, on the basis that the statement of claim did not disclose a reasonable cause of action against them; and

(c) I dismissed the application to strike out the action against the third, fifth and ninth defendants.

[50] As I had allowed the defendants' application in part, I ordered that there be no order as to costs.

[51] In the following paragraphs, I deal with the plaintiffs' application for discovery.

Discovery

[52] The plaintiffs in this case made an application for both general and specific discovery against the defendants. The application for specific discovery related to documents that were necessary to identify the particular persons whom the plaintiffs regard as the tortfeasors in their action.

[53] The plaintiffs' application for discovery cited the following grounds in support:

(a) that it was necessary and desirable in the interests of justice for the documents to be disclosed as it would allow compliance by the plaintiffs with the requirements of ss. 5 and 6 of the Government Proceedings Act 1956;

(b) that the failure disclose the necessary documents would adversely affect the plaintiffs' case;

(c) that the documents were relevant to the issues raised in the pleadings; and

(d) that the plaintiffs have been very specific and precise in their request for documents that are under the possession, custody and power of the defendants, to which documents the plaintiffs do not have access.

The Law Relating To Discovery

[54] In order to succeed in their application for discovery, the plaintiffs must establish the three essential elements identified by the Edgar Joseph Jr SCJ (delivering the judgment of the High Court) in *Yekambaran Marimuthu v. Malayawata Steel Berhad*[7]:

> The essential elements for an order for discovery are threefold; namely, first, there must be a "document", secondly, the document must be "relevant" and thirdly, the document must be or have been in the "possession, custody or power" of the party against whom the order for discovery is sought.

[55] Guidance as to whether a document sought is relevant is found in the following passage of the Singapore High Court case of *Manilal & Sons (Pte) Ltd v. Bhupendra KJ Shan (T/A JB International)*[8]:

> Under a general order of court for discovery, a party is obliged to make discovery of all documents relevant to the matters in question in the action. What are the matters in question would depend on the pleadings. A document relates to the matter in question in the action if it contains information which may - not which must - either directly or indirectly

A enable the party requiring the discovery either to advance his own case or to damage the case of his adversary or which may fairly lead to a train of inquiry which may have either of those two consequences: see *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co* (1882) 11 QBD 55 at p 62. Documents relate to matters in question in the action so long as they are likely to throw light on the case: see *Merchants' &* B *Manufacturers' Insurance Co Ltd v. Davies* [1938] 1 KB 196 at p 210.

Findings And Decision

[56] In this particular instance, I allowed the application both for general and specific discovery for the following reasons:

C (a) firstly, I was of the view that the requirements of the applicable test in *Yekambaran*'s case have been fulfilled: I was satisfied that there are documents that are in the possession of the defendants that relate the incident in question. I was also satisfied that these documents are or may be relevant to the facts that have been pleaded in the statement of claim. D Finally, it was not seriously in dispute that these documents remain in the possession, custody or power of the defendants. Where the defendants contend that a document is protected by privilege, then whether or not privilege applies will be a matter for determination by the court; and

E (b) the documents that have been specifically requested are required in order for the plaintiff to fulfil the requirements of ss. 5 and 6 of the Government Proceedings Act 1956 and the decision of the Federal Court in *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors*[9].

F **[57]** I was of the view that the decision in *Lay Kee Tee* prohibits a plaintiff from making a claim against the government without naming the specific tortfeasor as a party in the action. Senior Federal Counsel sought to argue that this view was misplaced, and that although ss. 5 and 6 provide that the tortious acts must be established against the specific public officers, they do not require the tortfeasors to be named or to be made a party to the action.

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[58] This court had the opportunity to review the case law relating to ss. 5 and 6 of the Government Proceedings Act 1956 in the case of *Aleyasak Hamid lwn. Ketua Polis Kuala Lumpur & Yang Lain*[10] (see paras. 43 to 64 of the judgment). It is patently clear to this court that the *ratio* of *Lay Kee Tee* H is that the tortfeasors must be made a defendant in action before proceedings may be maintained against the government for vicarious liability. It will be recalled that in *Lay Kee Tee*, the alleged tortfeasors, although identified in the statement of claim, had not been included as parties to the action.

[59] Indeed, in the case of *Aleyasak Hamid v. Ketua Polis Kuala Lumpur &* I *Yang Lain* this court had held that the principle in *Lay Kee Tee* does not apply in the limited instance where a plaintiff was not capable of identifying the public officer in question for reasons outside of the plaintiff's control, but this finding was reversed on appeal.[11]

[60] The application for discovery was accordingly allowed, with costs to be in the cause.

Endnotes:

1. [2009] 6 CLJ 617; [2009] 6 MLJ 145.
2. [2012] 8 CLJ 823; [2012] 10 MLJ 73.
3. [2015] 7 CLJ 1008; [2015] MLJU 261.
4. [1991] 2 CLJ 999; [1991] 2 CLJ (Rep) 739; [1991] 1 MLJ 440.
5. [2014] 8 CLJ 998; [2014] 6 MLJ 244.
6. [2012] LNS 830; [2013] 3 MLJ 511.
7. [1994] 2 CLJ 581.
8. [1981] 1 LNS 204; [1990] 2 MLJ 282.
9. [2009] 1 CLJ 663; [2009] 1 MLJ 1.
10. [2015] 5 CLJ 71; [2016] 7 MLJ 226; [2015] 4 MLRH 491.
11. In an unreported decision of the Court of Appeal dated 2 February 2016.